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## TRAILING IN THE WAKE: THE FREEDOM OF SPEECH IN MONTANA

John Wolff\*

### I. INTRODUCTION

Despite evidence that Article II, Section 7 affords greater protection to speech than the First Amendment, the Montana Supreme Court has consistently held otherwise.<sup>1</sup> Instead, the Montana Supreme Court has concluded that if a law is constitutional under the First Amendment, it is also constitutional under Article II, Section 7.<sup>2</sup> Given the currently lofty protection speech receives under the First Amendment, this usually presents no problem. However, the Montana Supreme Court has often broken from federal precedent to provide Montanans with less, not more, protection. This presents a two-fold problem. First, in some areas of speech, Montanans have received less than the minimally required safeguards of the First Amendment.<sup>3</sup> Second, even if censorship comports with the First Amendment, it should not necessarily mean censorship comports with Article II, Section 7's arguably heightened, but certainly independent, protection. Tethering Article II, Section 7 to the First Amendment means Montanans' right to free speech is determined by the United States Constitution, not the Montana Constitution. If the First Amendment is at low ebb some point in the future,<sup>4</sup> Article II, Section 7, should not fall with it.

The goal of this article is to establish the original meaning of the freedom of speech and expression in Article II, Section 7, of the 1972 Montana Constitution, and then ascertain where the Montana Supreme Court's precedents stand in relation to the original meaning. Part II of this paper delves into the development of the freedom of speech in Montana. First, in Part II-A and II-B, the 1884 and 1889 Constitutions are analyzed for clues indicating whether the prohibition against "impairing" the freedom of speech was a higher or lower protection than the U.S. Constitution's prohibition against "abridging" the freedom of speech. Next, Part II-C analyzes how the princi-

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1. *City of Helena v. Krautter*, 852 P.2d 636, 638 (Mont. 1993).

2. *Id.*

3. *E.g.*, *W. Tradition P'ship v. Attorney Gen. of State*, 271 P.3d 1 (Mont. 2011).

4. The First Amendment, like most of the Bill of Rights, has suffered through some low points in its history. *See Schenck v. United States*, 249 U.S. 47, 52 (1919) ("When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured . . .").

ples laid down by the 1884 and 1889 Constitution were incorporated into the 1972 Constitution's freedom of speech protection. Building from that, the transcripts of the 1972 Constitutional Convention, as well as the ratification record, are dissected to discover whether the 1972 Constitution added any additional protections to the freedom of speech. Part III applies these conclusions to three areas of speech in Montana to examine whether the Montana Supreme Court adheres to the original meaning of Article II, Section 7. Part IV is a brief conclusion.

## II. THE DEVELOPMENT OF MONTANA'S FREE SPEECH PROTECTION

Montana's free speech protection remained, with one exception, unchanged throughout three constitutions. However, each constitution built on its predecessor,<sup>5</sup> and the drafters at the 1972 Constitutional Convention placed special emphasis on expanding the protections afforded speech in the 1884 and 1889 Constitutions.<sup>6</sup> This history gives heightened importance to the protection of speech found in the 1884 and 1889 Constitutions whenever the 1972 Constitution's freedom of speech protection is being interpreted. The 1884 and 1889 Constitutions, then, are where to begin.

### A. *The 1884 Constitution: The Birth of Free Speech in Montana*

The 1884 Convention debates and notes consist almost entirely of roll calls and argument over the rules that governed the convention. Unfortunately, the few substantive debates and notes that do exist are virtually illegible.<sup>7</sup> There is still much that can be gleaned from the text itself, though.

Drafters placed the freedom of speech in the 1884 Constitution's declaration of rights in Article 1, Section 10:

That no law shall be passed impairing the freedom of speech; that every person shall be free to speak, write, or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel, the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact.<sup>8</sup>

Article 1, Section 10, made three important departures from its federal counterpart, of which only the first is of concern here: (1) the textual depar-

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5. See 2 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 618 (1979) [hereinafter CONSTITUTIONAL CONVENTION TRANSCRIPT II] (noting that none of the traditional rights had been reduced, and in some instances new safeguards had been added); MONT. CONST. OF 1884, art. I, § 10; MONT. CONST. OF 1889, art. III, § 10.

6. CONSTITUTIONAL CONVENTION TRANSCRIPT II, *supra* note 5 at 630.

7. There is a distinct lack of citations to the 1884 Constitution in academic writing. The convention was woefully under-recorded, but I suspect the lack of citations is also based on an inability to read the recordings that do exist.

8. MONT. CONST. OF 1884, art. I, § 10.

ture from *abridging* found in the First Amendment; (2) the granting of an affirmative right absent in the First Amendment; and (3) the libel clause absent in the First Amendment.<sup>9</sup>

In 1884, none of the rights contained in the Bill of Rights had been incorporated against the States.<sup>10</sup> Thus, the 1884 Convention was free to provide less protection to Montanans in the 1884 Constitution than Montanans received from the Federal Constitution. This requires a broader approach when analyzing the difference between *impairing* and *abridging* because if there is a difference, the difference cannot automatically be construed in favor of the 1884 Constitution providing more protection.

### 1. Finding Context From Other Departures From the Federal Text

It at least appears the 1884 Convention intended Montana's protection to be different because, instead of copying the Federal Constitution's use of "abridging," it used "impairing."<sup>11</sup> If the 1884 Convention wanted the clause's prohibition to equal the force of the First Amendment's prohibition, it seems an odd choice to deviate from that language in light of 1884 Constitution's verbatim use elsewhere of the Federal Constitution's other amendments.<sup>12</sup> Often when the text did make a departure, it was a substantive change that provided either a heightened or lessened right relative to its federal counterpart. For instance, the 1884 Constitution states no warrant shall issue without "describing the place to be searched or the person or thing to be seized, *as near as may be*."<sup>13</sup> The U.S. Constitution states no warrant shall issue unless it "*particularly* describe[s] the place to be searched."<sup>14</sup> "As near as may be" seems similar to "as best you can," whereas "particularly" demands a certain degree of detail that the State's best efforts may not always satisfy.<sup>15</sup> Similarly, the 1884 Constitution provides that the accused shall have the right "to *meet* the witnesses against him *face to face*," whereas its federal counterpart provides that the accused shall have the right "to be *confronted* with the witnesses against him."<sup>16</sup>

9. *Id.*; U.S. CONST. amend. I.

10. In 1925, the freedom of speech was the first to be incorporated against the states in *Gitlow v. New York*, 268 U.S. 652 (1925). This fact is taken into account in the discussion on the 1972 Constitutional Convention. See *infra* Part II-C.

11. MONT. CONST. OF 1884, art. I, § 10.

12. Compare U.S. CONST. § 20 with U.S. CONST. amend. VIII; compare MONT. CONST. OF 1884, art. I, § 25 with U.S. CONST. amend. V.

13. MONT. CONST. OF 1884, art. I, § 7 (emphasis added).

14. U.S. CONST. amend. IV (emphasis added).

15. A near contemporaneous dictionary defines "particularly" as "distinctly" and "in a high degree." WEBSTER'S REVISED UNABRIDGED DICTIONARY 1046 (Noah Porter ed., 1913) [hereinafter 1913 WEBSTER'S DICTIONARY].

16. MONT. CONST. OF 1884, art. I, § 16; U.S. CONST. amend. VI.

Although the recent Confrontation Clause cases have brought the two clauses into closer harmony, the guarantee of a face-to-face meeting was a significant departure from what the Confrontation Clause was understood to require in 1884.<sup>17</sup>

On the other hand, there are places where the text departed with no apparent intent to change the protection. For example, the 1884 Constitution provides that the writ of habeas corpus “shall *never* be suspended” whereas its federal counterpart provides that it “shall *not* be suspended.”<sup>18</sup> It would be elevating form over substance to suggest there is any difference between “never” and “not” in that context.

Other sections of the 1884 Constitution present tougher questions. In the 1884 Constitution a person shall not “be compelled to *testify* against himself” whereas its federal counterpart provides that a person shall not “be compelled . . . to be a *witness* against himself.”<sup>19</sup> The Federal Constitution’s use of “witness,” even in the late 19th century, was understood to protect all persons from giving evidence against themselves in any investigation.<sup>20</sup> Although “testimony” has been expanded outside of trial proceedings to include any response in which the accused explicitly or implicitly relates a factual assertion or discloses information,<sup>21</sup> historically it was thought to mean only the communication of facts under oath.<sup>22</sup> However, “testify” and “witness” had markedly similar definitions in the late 19th century.<sup>23</sup> Thus, it is unclear whether the 1884 Convention sought to limit the self-incrimination protection to the historically understood meaning of testify, or whether they simply replaced “witness” with “testify” under the belief the terms had equal meaning, and they simply preferred the term “testify.”

The foregoing analysis provides little help in determining when and where there was an intentional departure from the Federal Constitution’s protections. Although some intentional departures are clear both from the

17. See *State v. Clark*, 964 P.2d 766, 771–772 (Mont. 1998) (declining to follow federal precedent because the Montana Constitution framers “saw fit to distinguish our Confrontation Clause from the United States Constitution by insuring a criminal defendant the right ‘to meet the witnesses against him face to face.’”). The text of the Montana Constitution’s Confrontation Clause remains unchanged since 1884.

18. MONT. CONST. OF 1884, art. I, § 21 (“Writ of Habeas Corpus shall *never* be suspended”); U.S. CONST. art. I, § 9 (“Writ of Habeas Corpus shall *not* be suspended”).

19. MONT. CONST. OF 1884, art. I, § 18; U.S. CONST. amend. V.

20. *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892) (“The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime.”).

21. *State v. Devlin*, 980 P.2d 1037, 1039 (Mont. 1999) (citing *Doe v. United States*, 487 U.S. 201, 210 (1988)).

22. See *Andresen v. Maryland*, 427 U.S. 463, 470–471 (1976).

23. “Testify,” meant “[t]o make a solemn declaration under oath or affirmation” and “to bear witness,” while “witness” meant “[a]ttestation of a fact or an event” and “testimony.” 1913 WEBSTER’S DICTIONARY, *supra* note 15, at 1490, 1660.

language and the context, there are many places where the 1884 Constitution departed from the federal text without clearly affecting a substantive change to the protection, rather than a stylistic change. It is necessary to examine the direct difference between *impair* and *abridge* to address that shortcoming.

## 2. *Impair vs. Abridge: A Direct Comparison*

It has been noted that, at least in theory, *impair* provides a broader protection than *abridge* because prohibiting impairment is more comprehensive than prohibiting abridgment.<sup>24</sup> Despite this textual difference, the Montana Supreme Court has held the two words mean the same thing.<sup>25</sup>

To abridge means to shorten.<sup>26</sup> In the First Amendment, this word has been understood to mean no speech within the freedom may lose its First Amendment protections by being placed outside the freedom.<sup>27</sup> This idea is consistent with the Supreme Court's unwillingness to create new categories outside the freedom.<sup>28</sup> Speech within the freedom is still subject to regulation, but the freedom provides the speech within its cloak varying levels of protection that regulations must satisfy.<sup>29</sup>

To impair means to make worse, diminish in quantity or value, or to deteriorate.<sup>30</sup> Textually, *impair* is a more comprehensive protection than *abridge* for at least three reasons. First, similar to the First Amendment, Article I, Section 10 protects speech within the freedom.<sup>31</sup> Second, similar to the prohibition on abridgment preventing the government from shrinking the freedom, the prohibition on impairment likewise prevents shrinking the freedom because "impair" means "deteriorate."<sup>32</sup> Third, and most impor-

24. LARRY M. ELISON & FRITZ SNYDER, *THE MONTANA STATE CONSTITUTION: A REFERENCE GUIDE* 43 (G. Alan Tarr, ed., Ref. Guides to the State Constitutions of the U.S., 2001).

25. *Id.* at 43–44.

26. "Abridge" means "to make shorter" or "lessen." 1913 WEBSTER'S DICTIONARY, *supra* note 15, at 6.

27. Categories of speech that are not within "the freedom" include: Incitement (*Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam)); Defamation (*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)); Obscenity (*Miller v. California*, 413 U.S. 15 (1973)); Child pornography (*New York v. Ferber*, 458 U.S. 747 (1982)); Fighting words (*Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)); and True threats (*Watts v. United States*, 394 U.S. 705 (1969) (per curiam)).

28. See *United States v. Stevens*, 559 U.S. 460, 472 (2010) (refusing to find that depictions of animal cruelty are outside "the freedom.").

29. Regulations of speech within the freedom must generally satisfy either strict scrutiny or intermediate scrutiny, depending on the circumstances. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) (strict scrutiny for "content-based" regulations of speech); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (intermediate scrutiny for "content-neutral" regulations of speech).

30. "Impair." 1913 WEBSTER'S DICTIONARY, *supra* note 15, at 733.

31. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech[.]").

32. "Impair." 1913 WEBSTER'S DICTIONARY, *supra* note 15, at 733.

tantly, the prohibition on impairment protects the quality<sup>33</sup> and value<sup>34</sup> of the speech within the freedom, which indicates a more precise and exacting level of protection that speech regulations must satisfy. Thus, the prohibition on impairment takes its protections one step further by providing not only shall no speech within the freedom be placed outside the freedom, but also no speech within the freedom may be diminished in quality or value.

These definitions, however, are not always consistent with the 1884 Constitution's other uses of *impair* and *abridge*. The 1884 Constitution used the term *impair* three other times, and *abridge* twice (unfortunately, *impair* and *abridge* were never used within the same section).<sup>35</sup>

*Impair* first appears in the Contract Clause in Article I, Section 11.<sup>36</sup> On its face, the Contract Clause seems to use *impair* in similar fashion to the 1884 Constitution's free speech protection: "That no *ex-post facto* law, nor law impairing the obligation of contract, or retrospective in its operation . . . shall be passed by the Legislative Assembly."<sup>37</sup> But if the Contract Clause's use of *impair* was intended to provide a similar protection to Article 1, Section 10's use of *impair*, then the argument *impair* provides more protection than *abridge* is substantially weakened. This is because the 1884 Constitution's Contract Clause is virtually identical to the U.S. Constitution's Contract Clause,<sup>38</sup> and the U.S. Constitution's Contract Clause prohibition on impairing the obligation of contracts had been rendered almost meaningless by 1884 because of the Supreme Court's long held precedent that the states' police power encompassed considerable authority to disrupt contractual relationships in order to further the public interest.<sup>39</sup> So if *impair* in the 1884 Constitution's Contract Clause carried the same weight, or lack thereof, as *impair* in the U.S. Constitution's Contract Clause, and the 1884 Convention intended to use *impair* uniformly throughout the 1884 Constitution, it is unlikely the 1884 Convention used *impair* in Article I,

33. Because a prohibition on impairment is a prohibition on making something worse. 1913 WEBSTER'S DICTIONARY, *supra* note 15, at 733.

34. "Impair." 1913 WEBSTER'S DICTIONARY, *supra* note 15, at 733.

35. "Impair" is found in Article I, sections 10, 11, 28 and Article IV, section 26 of the 1884 Montana Constitution. "Abridge" is used twice in Article XV, section 9.

36. The full text reads: "That no *ex-post facto* law, nor law impairing the obligation of contracts, or retrospectives in its operation, or making any irrevocable grant of special privileges, franchises, or immunities shall be passed by the Legislative Assembly."

37. MONT. CONST. OF 1884, art. I, §§ 10–11.

38. *Id.* art. I, § 11; U.S. CONST. art. I, § 10, cl. 1. The full text reads: "No State shall enter into any Treaty, Alliance, or Confederation; grants Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

39. *Rediscovering the Contract Clause*, 97 HARV. L. REV. 1414, 1414–1415 (1984); *Stone v. Mississippi*, 101 U.S. 814, 818–820 (1879) (contractual obligations not binding when repudiation is necessary for effective exercise of police power).

Section 10, to create a protection greater than *abridge* provided in the U.S. Constitution. But there are substantial reasons why the uses cannot be equated. First, given the Federal Constitution's prohibition on laws impairing contracts is against the states, not Congress, the 1884 Montana Constitution's Contract Clause had to at least provide the same protections as the Federal Constitution's Contract Clause. Because the Federal Constitution's Contract Clause is substantially similar to the 1884 Montana Constitution's Contract Clause,<sup>40</sup> the 1884 Convention likely intended to march lockstep with the Federal Constitution. But such is not the case with the First Amendment and Article I, Section 10 because each uses a different prohibition, "abridge" and "impair," respectively, meaning the intention to march lockstep is not nearly as clear. Second, the Supreme Court's interpretation of the Contract Clause was necessary to avoid two persons contracting to be free from State regulation, which would completely undermine the State's police power.<sup>41</sup> This means the use of *impair* in the 1884 Constitution's Contract Clause is not indicative of Article I, Section 10's use of *impair* because the Contract Clause would have no more punch if the word *abridge* had been used when the subservience of the Contract Clause is due to its ability to destroy the police power rather than any weaknesses inherent in the term *impair*. In essence, the difference is cognizable when Article I, Section 10, uses *impair* instead of *abridge* due to the difference in the terms themselves, whereas the difference is not cognizable when the 1884 Constitution's Contract Clause uses *impair* instead *abridge*, not because of any similarity in the terms, but rather due to the potential the Contract Clause has to destroy the police power.

*Impair* next appears in the Unenumerated Rights found in Article, I, Section 28.<sup>42</sup> The use of *impair* in the Unenumerated Rights section is especially revealing because the section is otherwise a mirror image of the U.S. Constitution's Ninth Amendment.<sup>43</sup> This suggests Article I, Section 28's use of *impair* is perhaps at most in unison with Article I, Section 10's use of *impair* because both represent a deliberate choice to use the term in lieu of the federal text. The 1884 Convention's use of *disparage* and *impair* side-by-side narrows the meaning of *impair* because *disparage* takes away one of *impair*'s three meanings, to devalue. *Disparage* means to "dishonor by a

40. Although the sections are fairly different, the Contract Clause of each section is basically the same.

41. Elmer W. Roller, *The Impairment of Contract Obligations and Vested Rights*, 6 MARQ. L. REV. 129, 130 (1922); *Manigault v. Springs*, 199 U.S. 473, 480 (1905) ("[P]arties by entering into contracts may not estop the legislature from enacting laws intended for the public good.")

42. The full text reads: "The enumeration in this Constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people."

43. U.S. CONST. amend. IX. The full text reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."



comparison with what is inferior,” “to lower in rank or estimation by actions or words,” “to speak slightly of,” “to depreciate,” or “to undervalue.”<sup>44</sup> This means Article I, Section 28’s use of *impair* was added to prohibit both deteriorating unenumerated rights and qualitatively diminishing unenumerated rights. Applied to Article I, Section 28, to *disparage* is to undervalue an unenumerated right by providing it with less protection than an enumerated right. This might mean the legislature is prohibited from regulating at will an unenumerated right simply because it is an unenumerated right. To *impair* is to take away an unenumerated right, i.e. deteriorate, or to affirmatively reduce the quality of the unenumerated right. This might mean the legislature is prohibited from making an unenumerated right non-existent, and that the legislature is prohibited from reducing the quality of a person’s exercise of the unenumerated right. Thus, if the 1884 Convention intended *impair* to provide the same protection in Article I, Section 10, as it did in Article I, Section 28, *impair*’s meaning in Article I, Section 10, can be narrowed to mean a prohibition on deterioration and qualitative diminishment.

The last place *impair* appears is in Article IV, Section 26. Under Article IV, Section 26, the legislature may not pass a law “authorizing the creation, extention [sic] or impairing of liens.”<sup>45</sup> Although “impairing” a lien fits squarely within the definition of *impair* thus far established, the use of *impair* in this section provides little insight into the 1884 Convention’s intention because there is no case law on the section, no corresponding federal text, and the section has since been scrapped from the Montana Constitution altogether.

*Abridge* appears twice within Article XV, Section 9. This section reinforces the point that the convention thought *impair* and *abridge* have different meanings, and that the choice to use either in the various places they are found was a deliberate one. Article XV, Section 9 reads:

The right of eminent domain shall never be abridged, nor so construed as to prevent the Legislative Assembly from taking the property and franchises of incorporated companies, and subjecting them to public use the same as the property of individuals; and the police powers of the State shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well-being of the State.<sup>46</sup>

Article XV, Section 9 uses *abridge* consistently with the First Amendment. Just as the First Amendment prevents speech within “the freedom”

44. “Disparage.” 1913 WEBSTER’S DICTIONARY, *supra* note 15, at 428.

45. The full text of Article IV, section 26 is impossibly large, but the pertinent part states: “The Legislative Assembly shall not pass local or special laws in any of the following enumerated cases . . . authorizing the creation, extention, or impairing of liens.”

46. MONT. CONST. OF 1884, art. XV, § 9.

from being placed outside “the freedom,” Article XV, Section 9 prevents property within “eminent domain” from being placed outside “eminent domain.” The second clause qualifies the first; it affirmatively places the property and franchises of incorporated companies within “eminent domain,” thus preventing them from ever being placed outside “eminent domain.” Similarly, Article XV, Section 9 uses *abridge* to protect the police power of the state. Similar to the eminent domain provision, the second clause qualifies the first; it affirmatively states that within the state’s “police power” is the ability to regulate corporations that infringe on the equal rights of individuals, thus preventing those corporations from being placed beyond the state’s “police power.” If the 1884 Convention has used *impair* instead of *abridge*, it would have led to different results. *Impair* has been used in the other provisions to mean deteriorate and diminish in quality. If *impair* had been used in Article XV, Section 9, it would have prevented placing corporate property outside the power of “eminent domain,” and also reducing “eminent domain” in quality.<sup>47</sup>

The contemporaneous definition of *impair*; its use in Article I, Section 28; and Article XV, Section 9’s use of *abridge* lead to the conclusion *impair* was intended to provide more protection than *abridge* in Article I, Section 10 of the 1884 Montana Constitution. The two terms’ coexistence in the same document underscores this point. While a prohibition on abridging a right protected any acts within that right from being placed outside of the right, a prohibition on impairing a right went one step further by providing the right may not be deteriorated or diminished in quality either. Thus, the 1884 Constitution provided a heightened layer of protection against regulations that might chill, i.e. deteriorate or diminish in quality, speech.

### *B. The 1889 Constitution: Deliberately Choosing “Impair” Over “Abridge”*

The 1889 Montana Constitution made no substantive changes to the 1884 Montana Constitution’s Article I, Section 10.<sup>48</sup> Interestingly, however, during the 1889 Convention an amendment was proposed replacing “impair” with “abridge.” Unfortunately, the record is silent as to why the amendment was declined, but the language of the proposed amendment is

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47. By, for instance, laws that regulated how much property the State could take, or perhaps the only areas where the State could take property. Such laws would reduce the “quality” of eminent domain.

48. The full text reads: “No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel, the truth thereof may be given in evidence; and the jury, under the direction of the court, shall determine the law and the facts.” MONT. CONST. OF 1884, art. III, § 10.

still valuable. Delegate Winston, of Deer Lodge, proposed the following amendment:

Declaration of Rights. Section 10. Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for all abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all suits or prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury that the matter charged as libelous was true, and was published with good motives and for justifiable ends, the party shall be acquitted and the jury, under the direction of the court, shall determine the law and the fact.<sup>49</sup>

It is entirely possible this amendment was not adopted strictly because of the wordy phrasing of the libel clause. But it is equally plausible that if the convention liked the change from “impair” to “restrain or abridge,” they could have made the change while keeping the 1884 Constitution’s libel clause.

The proposed amendment also offered a subtle, albeit significant, difference. “[N]o law passed *to* restrain or abridge,” implies legislative intent is the test. If such language had been adopted, it is likely every content-neutral law would pass muster because none are passed *to* restrain speech; the restraint of speech is merely incidental.<sup>50</sup> “No law shall be passed *impairing*,” on the other hand, implies any law that sufficiently “impairs” the freedom of speech is unconstitutional, thus bringing every content-neutral law within its consideration.

The 1889 Constitution’s contribution to the discussion is small, but important. The 1884 Convention offered numerous clues to the difference between *impair* and *abridge*, but, other than the use of *impair* itself, did not provide hard evidence of the convention deliberately declining *abridge* in favor of *impair*. The 1889 Convention provides that missing link.

### C. *The 1972 Constitution: Demanding a Progressive Freedom of Speech*

A lot changed between the 1889 Constitution and the 1972 Constitution. The First Amendment’s free speech clause was incorporated against the states, meaning any state constitution had to provide at least the same protections as the First Amendment. The U.S. Supreme Court also decided *United States v. Carolene Products*,<sup>51</sup> giving rise to varying levels of scru-

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49. PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION: HELD IN THE CITY OF HELENA, MONTANA JULY 4, 1889, AUGUST, 17, 1889, 118 (1921).

50. This is an especially important distinction given it was thirty-six years prior to incorporation of the First Amendment’s free speech clause against the States, and forty-nine years before the famous footnote 4 in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

51. 304 U.S. 144 (1938).

tiny, including the *United States v. O'Brien*<sup>52</sup> test. The freedom of expression, or conduct-based speech, was widely recognized.<sup>53</sup> The 1972 Convention took care to address these developments, and to expand on them. In so doing, the 1972 Convention relied on the free speech principles laid down by the 1884 and 1889 Constitutions.

### 1. *The Rejected Proposal*

Delegate Bob Campbell<sup>54</sup> offered a proposal to the Bill of Rights Committee for “a new constitutional section to ensure the rights of individual dignity, privacy, and free expression.”<sup>55</sup> The proposed section provided:

The rights of individual dignity, privacy, and free expression being essential to the well-being of a free society, the state shall not infringe upon these rights without the showing of a compelling state interest.<sup>56</sup>

Although all three of Delegate Campbell’s new rights found their way into the 1972 Constitution, only the right of privacy retained the compelling interest language.<sup>57</sup> This can be read multiple ways. It could mean rights of dignity and speech or expression are absolute, and the 1972 Constitution placed a complete prohibition on infringing them. This reading is unlikely given that *Carolene Products*’ tiers of judicial scrutiny were in existence and content-neutral laws were commonly accepted permissible regulations. The more likely reading is privacy was more important than either dignity or speech; whereas infringement of dignity and speech could be justified by a content-neutral substantial government interest, only a compelling government interest could justify infringing privacy. Regardless, Delegate Campbell’s rejected proposal is the first time the term “expression” was considered by the 1972 Convention. Apparently, the 1972 Convention appreciated the term’s inclusion because “expression” became an integral part of the proposal that was ultimately accepted, and enshrined, in the 1972 Constitution.

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52. 391 U.S. 367, 376–377 (1968) (“[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than essential to the furtherance of that interest.”).

53. *Stromberg v. California*, 283 U.S. 359 (1931); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503 (1969).

54. Fritz Snyder & Mae Nan Ellingson, *The Lawyer-Delegates of the 1972 Montana Constitutional Convention: Their Influence and Importance*, 72 MONT. L. REV. 53, 58 (2011) (“perhaps the most idealistic of the lawyer-delegates . . .”).

55. 3 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 266 (1981). [hereinafter CONSTITUTIONAL CONVENTION TRANSCRIPT III].

56. 1 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 127 (1979). [hereinafter CONSTITUTIONAL CONVENTION TRANSCRIPT I].

57. *Compare* MONT. CONST. art. II, § 4, 7 with MONT. CONST. art. II, § 10.

## 2. *The Accepted Proposal*

Upon reaching a unanimous vote for the adoption of its newly drafted Bill of Rights, the Bill of Rights Committee submitted a memo to the Convention:

The Bill of Rights Committee submits herewith a proposed new Declaration of Rights of the People of the State of Montana. The proposed article is intended to replace in its entirety Article III of the [1889 Constitution]. In doing so, the committee notes that not one of the traditional rights of that Declaration has been diminished; and, to meet the changing circumstances of contemporary life, new safeguards have been added where appropriate.<sup>58</sup>

The memo is important because it illustrates the 1972 Convention's adoption of the 1889 Constitution's principles, and it either meant to keep them the same, or expand upon them. With regard to the freedom of speech, it is clear from the text that the convention meant to expand the right. The new freedom of speech section, which the convention overwhelmingly approved with no amendments,<sup>59</sup> reads:

Freedom of Speech, Expression, and Press. No law shall be passed impairing the freedom of speech or expression. Every person shall be free to speak or publish whatever he will on any subject, being responsible for all abuse of that liberty. In all suits and prosecutions for libel or slander the truth thereof may be given in evidence; and the jury, under the direction of the court, shall determine the law and the facts.<sup>60</sup>

Accompanying the Bill of Rights Committee's submittal of the new freedom of speech section was perhaps the most important comment in Montana's free speech history:

The committee unanimously proposes this adoption of former Article III, Section 10 with one substantive change. The freedom of speech is extended, in line with federal decisions under the First Amendment, to cover the freedom of expression. Hopefully, this extension will provide impetus to the courts in Montana to rule on various forms of expression similar to the spoken word and the ways in which one expresses his unique personality in an effort to rebalance the general backseat status of states in the safeguarding of civil liberties. The committee wishes to stress the primacy of these guarantees in the hope that their enforcement will not continue merely in the wake of the federal case law.<sup>61</sup>

This comment is important because it indicates that progressively protecting the freedom of speech, whether spoken or through expression, is within the original meaning of the section. This meaning, combined with the heightened protection already provided by *impair*, is a directive to the

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58. CONSTITUTIONAL CONVENTION TRANSCRIPT II, *supra* note 5, at 618.

59. 5 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 1651 (1981). [hereinafter CONSTITUTIONAL CONVENTION TRANSCRIPT V].

60. MONT. CONST. art. II, § 7.

61. CONSTITUTIONAL CONVENTION TRANSCRIPT II, *supra* note 5, at 630.

Montana Supreme Court to proactively protect speech, rather than merely following federal precedent. The ratification record indicates the voters also understood and believed that the freedom of expression contained in their constitution was a more protective right, separate and independent of the First Amendment.

### 3. *The Ratification Record*

There is a general disagreement over whose understanding is more authoritative: the drafters or the lawmakers—the people who voted to ratify the constitution.<sup>62</sup> If the goal of this article was to settle that debate, it would be a poor vehicle for it because the ratification record indicates the drafters and lawmakers intended similar meanings regarding Article II, Section 7.<sup>63</sup>

The document that most likely helped voters understand the new freedom of speech provision was a voter pamphlet containing the official proposed text with accompanying explanations, published by the 1972 Convention for the voters of Montana.<sup>64</sup> Although newspapers at the time generally stated the freedom of speech had been “broadened,”<sup>65</sup> the voter pamphlet provided voters with context for the new constitution they were considering by explaining the differences between the 1889 and 1972 constitutions.<sup>66</sup> The voter pamphlet explicitly differentiated between rights retained from the 1889 Constitution and new rights added to the proposed 1972 Constitution.<sup>67</sup> Under the rights retained section, the voter pamphlet states: “No rights protected by the present Montana Declaration of Rights are deleted or abridged in the proposed Constitution. These include the freedom of speech[.]”<sup>68</sup> This statement is important because it informs the voters that while certain rights have been carried over, none of those have

62. Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. REV. 217, 226–228 (2004). An offshoot of the “original understanding of the voters” method is the “original public meaning” method, which is the objective public meaning to a reasonable person at the time of ratification. “Original public meaning” is often used when the “original understanding of the voters” is unascertainable.

63. An excellent resource (used extensively for this article) for those interested in the 1972 Montana Constitution's ratification record is located at <http://www.umt.edu/law/library/montanaconstitution/default.php>.

64. PROPOSED 1972 CONSTITUTION FOR THE STATE OF MONTANA: OFFICIAL TEXT WITH EXPLANATION (1972) [hereinafter VOTER INFORMATION PAMPHLET].

65. *Con Con Delegates OK Bans on Discrimination*, HELENA ASSOCIATED PRESS, Mar. 8, 1972, <http://perma.cc/9KES-UUFA>. One even quoted the Bill of Rights Committee's comment on the new freedom of speech provision. Frank Adams, *Bill of Rights is Good, but It Could Have Been Better*, THE MONTANA STANDARD, Mar. 13, 1972; CONSTITUTIONAL CONVENTION TRANSCRIPT II, *supra* note 5, at 630.

66. VOTER INFORMATION PAMPHLET, *supra* note 64, at 5.

67. *Id.* at 3.

68. *Id.*

decreased their protections. This is another way of stating if there has been a change in the right, it has only increased the right's minimum level of protection. This notion, that some rights have remained the same while others have increased, is further communicated in the pamphlet's explanation of the Declaration of Rights section. For instance, the right to suffrage, the right to keep and bear arms, and the freedom of speech are classified as rights that "have not been deleted or abridged," meaning at the very least they have stayed the same, but potentially could be more protective.<sup>69</sup> The Explanation section then informs the voter whether and how the rights have changed. The Explanation section of both the right to suffrage and the right to keep and bear arms states "[i]dentical to 1889 constitution."<sup>70</sup> From that explanation, the voters know they will enjoy those two freedoms under the 1972 Constitution just as they did in the 1889 Constitution—no more and no less. In contrast, the Explanation section of the freedom of speech explains that the right has not remained the same, and instead is more protective. The Explanation section states "[r]evises 1889 constitution by enlarging a citizen's freedom to express himself[.]"<sup>71</sup> Voters would understand the explanation to mean the 1972 Constitution offered a more protective freedom of speech than the 1889 Constitution.

The text of the 1972 Constitution, the 1972 Constitutional Convention's debates, and the ratification record are all seemingly in agreement that the 1972 Constitution's freedom of speech provision stands on its own with heightened protections, separate and distinct from the First Amendment. The question becomes whether the Montana Supreme Court has given Article II, Section 7, the same meaning.

### III. APPLYING THE 1972 DIRECTIVE TO THE MONTANA SUPREME COURT'S PRECEDENTS

Three areas of speech in Montana, the *Chaplinsky v. New Hampshire*<sup>72</sup> "fighting words" exception, political speech, and expressive conduct, indicate the Montana Supreme Court's jurisprudence is trending in the wrong direction. More broadly, these categories of speech, when taken together, illustrate the fundamental problem with tethering Article II, Section 7's protection to the First Amendment. Instead of recognizing an arguably stronger—but certainly independent—right, the protection afforded Montanans' speech is bound by U.S. Supreme Court precedent. U.S. Su-

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69. *Id.*

70. *Id.* at 6.

71. *Id.*

72. 315 U.S. 568, 572 (1942).

preme Court precedent is always subject to change, including regression,<sup>73</sup> and once established, is sometimes rarely revisited for clarification.<sup>74</sup> By strictly following First Amendment precedent, the Montana Supreme Court fails to uphold speech that should be protected under Article II, Section 7, even if it is not protected under the First Amendment. It also risks misapplying the First Amendment, thus depriving Montanans of even that minimally required safeguard.

#### A. *Fighting Words and Matters of Public Interest*

Unsurprisingly, the “fighting words” exception is one of the more developed areas of free speech in Montana.<sup>75</sup> In *Chaplinsky*, the United States Supreme Court held “fighting words” can be prevented and punished without raising any First Amendment issues.<sup>76</sup> The Court defined “fighting words” to mean “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>77</sup> In the years since *Chaplinsky* was decided, the United States Supreme Court has never again upheld a conviction based on the “fighting words” exception.<sup>78</sup> Although *Chaplinsky*’s “fighting words” exception has not been overturned, the United States Supreme Court has reversed the conviction each time it has reviewed a case involving “fighting words.”<sup>79</sup> Montana, on the other hand, “has demonstrated a greater willingness to uphold convictions based on ‘fighting words.’”<sup>80</sup>

When Montana quells speech under *Chaplinsky*’s “fighting words” exception, the speech often concerns matters of public interest, namely the relationship between citizens and the police. This is perhaps the original sin of *Chaplinsky*: *Chaplinsky* was convicted for telling a city marshal “You are a God damned racketeer” and “a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.”<sup>81</sup> Given the United States Supreme Court’s efforts in the years since to narrow, perhaps even

73. Regression can often be fairly quick. *Compare* *Citizens United v. Fed. Election Com’n*, 558 U.S. 310 (2010) with *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015).

74. See John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291, 337 (2009) (“The secondary effects doctrine is among the least understood of First Amendment principles . . . [t]he Supreme Court is largely to blame for this, having failed to explain what is meant by a secondary effect or why this should matter for constitutional purposes.”).

75. The “fighting words” exception was adopted in *City of Whitefish v. O’Shaughnessy*, 704 P.2d 1021, 1024 (Mont. 1985) (citing *Chaplinsky*, 315 U.S. at 572).

76. *Chaplinsky*, 315 U.S. at 571–572.

77. *Id.* at 572.

78. *State v. Dugan*, 303 P.3d 755, 762 (Mont. 2013).

79. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1002 (3d. ed. 2006).

80. *Dugan*, 303 P.3d at 764.

81. *Chaplinsky*, 315 U.S. at 569.



undo, *Chaplinsky*'s application,<sup>82</sup> Montana, by continuing to apply *Chaplinsky*, is arguably affording its citizens less protection than even the U.S. Constitution provides. This fact becomes all the more concerning in light of the Montana Constitution's heightened protection of speech. Montana's fighting words cases provide ample evidence of speech under the Montana Constitution being afforded less protection than speech under the U.S. Constitution.

The first case is *City of Whitefish v. O'Shaughnessy*,<sup>83</sup> where, while walking home at 2:00 a.m. and in response to an officer asking him and his friends to keep it down, O'Shaughnessy got in the back of the officer's patrol car, got out, then got back in, and back out again.<sup>84</sup> He then tried to high-five the officer. When the officer refused, O'Shaughnessy said, "well, mother-fucker, I will holler and yell when and wherever I want if I want to."<sup>85</sup> The Court held O'Shaughnessy's speech constituted unprotected fighting words.<sup>86</sup>

Following *O'Shaughnessy* was *State v. Robinson*.<sup>87</sup> In *Robinson*, the defendant, seemingly unprovoked, crossed the street in a crowd and called an officer a "fucking pig."<sup>88</sup> The officer approached Robinson and asked if there was anything he wanted to talk about, and Robinson replied "fuck off, asshole."<sup>89</sup> The Court held Robinson's speech constituted unprotected fighting words.<sup>90</sup>

*State v. Dugan*<sup>91</sup> distinguished itself from *O'Shaughnessy* and *Robinson*.<sup>92</sup> Dugan called someone a "fucking cunt" over the phone.<sup>93</sup> The Court held Dugan's speech was not fighting words because it had happened over the phone instead of being uttered in a public place or in a face-to-face setting.<sup>94</sup>

*City of Billings v. Nelson*,<sup>95</sup> in turn, distinguished itself from *Dugan* based on *Dugan*'s face-to-face setting rule.<sup>96</sup> Nelson's vehicle pulled up

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82. *Dugan*, 303 P.3d at 762.

83. 704 P.2d 1021 (Mont. 1985).

84. *Id.* at 1022–1023.

85. *Id.*

86. *Id.* at 1024.

87. 82 P.3d 27 (Mont. 2003).

88. *Id.* at 28.

89. *Id.* at 28–29.

90. *Id.* at 31.

91. 303 P.3d 755 (Mont. 2013).

92. *Id.* at 764–767.

93. *Id.* at 759.

94. *Id.* at 767.

95. 322 P.3d 1039 (Mont. 2014).

96. *Id.* at 1042, 1045.

next to her 13-year-old neighbor, whom she called a “spic bastard.” The Court held Nelson’s speech constituted unprotected fighting words.<sup>97</sup>

Both *O’Shaughnessy* and *Robinson* represent significant erosions of free speech under Article II, Section 7.<sup>98</sup> Although Montanans cannot goad police officers with fighting words at will, neither O’Shaughnessy nor Robinson did so. Neither spoke words that invited a fight with the police officer. If anything, each voiced a sincere dislike of Montana’s police power to the most visible symbol of that police power. The *Robinson* Court acknowledged this when it admitted if Robinson called the officer a “fucking pig” at a political rally, free speech “might well” prevail.<sup>99</sup> Despite that concession, the Court upheld a conviction the United States Supreme Court would not hesitate to reverse.<sup>100</sup> In fact, the *Robinson* Court went out of its way to explicitly reject Ninth Circuit precedent that protected Robinson’s communication, choosing instead to apply *O’Shaughnessy*.<sup>101</sup> This is glaring because it expressly rejected the Ninth Circuit’s more protective application of the fighting words exception under the First Amendment in favor of applying a less protective application of the fighting words exception under Article II, Section 7. Article II, Section 7, under the Fourteenth Amendment, has to provide at least the same protection as the First Amendment, and under the original meaning is supposed to provide more protection. There can be little doubt the Court’s decision to uphold the threat of criminal prosecution for expressing displeasure with the police will chill the kind of speech that lies at the heart of the First Amendment and Article II, Section 7.<sup>102</sup>

*Dugan* seemingly recognized Montana’s eagerness to label speech as fighting words, and added a safeguard to scale back the increasingly over-used exception. Although only a small step,<sup>103</sup> the requirement that fighting

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97. *Id.* at 1045.

98. Although the *Robinson* opinion declared it was proceeding under only the U.S. Constitution, it relied almost exclusively on *O’Shaughnessy*, which was based on Article II, section 7. Furthermore, given that the Montana Supreme Court has consistently held the Montana Constitution affords no greater protection than the U.S. Constitution, it was an odd distinction to make. The distinction has likely already been lost because both *Dugan* and *Nelson*, both decided under Article II, section 7, used *Robinson* as precedent.

99. *Robinson*, 82 P.3d at 31.

100. See *Snyder v. Phelps*, 562 U.S. 443, 451–452 (2011) (quoting *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 758–759 (1985) (citations omitted)) (“[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”).

101. *Robinson*, 82 P.3d at 30.

102. *United States v. Alvarez*, 132 S. Ct. 2537, 2548 (2012); see also *Montana Auto. Ass’n v. Greely*, 632 P.2d 300, 305 (Mont. 1981) (“Criticism of government is at the very center of the constitutional protection of free speech.”).

103. Primarily brought about by legal scholarship. See *Dugan*, 303 P.3d at 766–767 (citing various law review articles).

words be spoken face-to-face<sup>104</sup> prevents the exception from expanding into telephonic or digital communications in a world where such communications are quickly becoming the preferred method of communication. But the implication from the *Dugan* analysis is if the communication had been spoken face-to-face, it would have been unprotected “fighting words.” *Nelson* is the realization of that implication.<sup>105</sup> While *Dugan* and *Nelson* protect someone who expresses displeasure to the police over the phone, they undo none of *O’Shaughnessy* and *Robinson*’s chilling effects if someone wants to express displeasure with the police in person. Under current precedent, not only are Montanans denied heightened protections under Article II, Section 7 to voice opinions on matters of public interest, they are actually denied the protections of the First Amendment, too.

### B. Political Speech

The First Amendment has been said to have its “fullest and most urgent application” in the arena of political speech.<sup>106</sup> The recent decisions in *Citizens United v. FEC*<sup>107</sup> and *McCutcheon v. FEC*<sup>108</sup> certainly underscore that sentiment, although *Williams-Yulee v. Florida Bar*<sup>109</sup> has since limited *Citizen United*’s reach in judicial elections. Interestingly, as with the “fighting words” exception, when Montana recently broke from federal precedent in the political speech context, it did so to provide less protection, not more.

Despite *Citizens United*’s strong language that “[a]n outright ban on corporate political speech”<sup>110</sup> is not permissible under the First Amendment, the Montana Supreme Court upheld an outright ban on corporate political speech in *Western Tradition Partnership v. Attorney General of State*.<sup>111</sup> The dissent,<sup>112</sup> and subsequent rapidly-issued reversal from the United States Supreme Court,<sup>113</sup> painted *Western Tradition Partnership* as

104. *Dugan*, 303 P.3d at 767.

105. See *Nelson*, 322 P.3d at 1045 (citing *Dugan*, 303 P.3d at 765–767) (“The fact that Nelson and [her co-defendant] were in a car does not mean their speech could not have incited an immediate violent response from a listener on the street.”).

106. *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (citing *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271–272 (1971)).

107. 558 U.S. 310 (2010).

108. 134 S. Ct. 1434 (2014).

109. 135 S. Ct. 1656, 1673 (2015) (upholding a state law that prohibited judicial candidates from personally soliciting campaign funds).

110. *Citizens United*, 558 U.S. at 361.

111. 271 P.3d 1, 13 (Mont.2011).

112. *Id.* at 17 (Nelson, J., dissenting) (“What ‘unique’ interests render Montana exempt from *Citizens United*? One searches the Court’s Opinion in vain to find any.”).

113. *Am. Tradition P’ship. v. Bullock*, 132 S. Ct. 2490, 2491 (2012) (per curiam) (“Montana’s arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case.”).

an effort to undermine the First Amendment's protection of corporate speech in the political arena. Under *Citizens United's* broad protection of corporate political speech, it certainly seems true. But interestingly, *Western Tradition Partnership* marked a departure from an otherwise highly protected area of speech in Montana, evidenced by *Montana Automobile Ass'n v. Greely*,<sup>114</sup> where the Montana Supreme Court made great efforts to accommodate lobbying speech.<sup>115</sup> *Greely* concerned a ballot initiative that amended Montana's lobbying act, including prohibiting any attempt by lobbyists to "influence the action of any public official on any measure . . . [by the] promise of support or opposition at any future election,"<sup>116</sup> and prohibiting organizations from soliciting "directly, indirectly or by an advertising campaign, the lobbying efforts of another person."<sup>117</sup> Although the Court noted that "[w]hen these laws have been challenged, the courts have not had difficulty finding a compelling interest as a basis for enactment,"<sup>118</sup> it unanimously struck down both provisions of the initiative as unconstitutional regulations of speech.<sup>119</sup> The length *Greely* went to protect lobbying speech is exhibited not only in the extensive analysis done under the First Amendment,<sup>120</sup> but also in the Court's use of the Privileges and Immunities Clause<sup>121</sup> to promote the lobbying speech and interests of non-Montana citizens.<sup>122</sup>

*Western Tradition Partnership* and *Greely* march in almost opposite directions, with *Western Tradition Partnership* shrugging off friendly First Amendment precedent to provide speech less protection, and *Greely* applying less-friendly First Amendment precedent<sup>123</sup> to provide speech more protection.<sup>124</sup> The only real commonality between *Western Tradition Partnership* and *Greely* is in their treatment of Article II, Section 7. Any mention of Article II, Section 7, is noticeably absent from *Western Tradition Partnership*, while *Greely* only passively references Article II, Section 7,<sup>125</sup> instead choosing to analyze the issue solely under First Amendment prece-

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114. 632 P.2d 300 (Mont. 1981).

115. *Id.* at 311.

116. *Id.* at 305.

117. *Id.* at 306.

118. *Id.* at 303.

119. *Id.* at 305, 308.

120. *Greely*, 632 P.2d at 305–310.

121. U.S. CONST. art. IV, § 2, cl. 1.

122. *Greely*, 632 P.2d at 304; see also Anthony Johnstone, *Outside Influence*, 13 ELECTION L.J. 117, 137 (2014) (noting the Montana Supreme Court's "odd analogy to a vague doctrine.").

123. *Greely*, 632 P.2d at 303 (citing *United States v. Harriss*, 347 U.S. 612 (1954); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Young Americans for Freedom, Inc. v. Gorton*, 522 P.2d 189 (Wash. 1974); *Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir. 1978); *Montgomery County v. Walsh*, 336 A.2d 97 (Md. 1975)).

124. *Id.* at 305–310.

125. See *id.* at 305, 308.

dent.<sup>126</sup> The lack of review under Article II, Section 7 is somewhat understandable in each case. *Greely* found the statute at issue violated the First Amendment,<sup>127</sup> which negated any need to discuss whether it violated the potentially higher ceiling of Article II, Section 7. When *Western Tradition Partnership* was decided, it was widely understood that Article II, Section 7, provided no more protection than the First Amendment.<sup>128</sup> Nonetheless, both cases provide examples of the importance of Article II, Section 7's independence from the First Amendment. Given *Greely*'s scant treatment of Article II, Section 7, it is reasonable to assume that had the statute not violated the First Amendment, the analysis would have ended there. *Western Tradition Partnership* confirms this notion: once the law was found not to violate the First Amendment, the analysis ended. In either case, the United States Constitution dictated the level of protection the speech received, not the Montana Constitution. This represents the danger of not following Article II, Section 7's original meaning: that is, refusing to acknowledge a heightened protection under Article II, Section 7, and instead marching lockstep with federal precedent.

In all likelihood, *Williams-Yulee*'s interpretation of the First Amendment will mark another instance of the United States Constitution dictating the level of protection afforded speech in Montana. Regulations concerning judicial candidates will be held valid under the First Amendment without any independent analysis of whether the regulations violate Article II, Section 7. Judicial candidates' speech should be susceptible to valid regulation in Montana like any other speech, but *Williams-Yulee* should not be dispositive on the issue. Although *Williams-Yulee* was probably a welcome retreat from *Citizens United* for many people, if current trends hold, the Montana Supreme Court will continue to trail "in the wake" of the United States Supreme Court. The fluctuation from *Greely*, up to *Citizens United*, and then back down to *Williams-Yulee*, is precisely what the 1972 Convention tried to guard against.

### C. Expressive Conduct

Despite Article II, Section 7's explicit protection of the freedom of expression, and the 1972 Convention's original intent, the Montana Supreme Court often designates seemingly expressive conduct as non-expressive. Even though all courts deal with the reality that virtually all conduct has the potential to be expressive, the Montana Supreme Court's expressive

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126. *Id.* at 305–310.

127. *Id.* at 305, 308.

128. *See Krautter*, 852 P.2d at 638.

conduct decisions are especially unprotective.<sup>129</sup> There are two different ways to view this: on one hand, the Montana Supreme Court is strengthening its intermediate scrutiny precedent by finding dubiously expressive conduct as actually not expressive at all, but on the other, it's not scrutinizing regulations to ensure they are used for a valid, content-neutral purpose.

In one regard, a skeptical view of certain claims of violations of expressive conduct is actually protective of speech. Given the potentially endless amount of laws that arguably impair expressive conduct, finding most conduct to be expressive would actually remove many teeth from the analysis applied to the content-neutral laws that are usually implicated. For instance, it is much simpler, and also probably doctrinally correct,<sup>130</sup> to find a porn actor's refusal to wear a condom is non-expressive conduct that does not implicate the freedom of speech,<sup>131</sup> than to find it is expressive conduct, but the expressive conduct is nonetheless lawfully impaired by a content-neutral regulation. If such conduct were deemed expressive, not only would the result be the same,<sup>132</sup> but there would also be another decision added to the growing list of precedent where an expression gave way to the law impairing it.

On the other hand, by refusing to acknowledge certain conduct is expressive, courts are not providing expressive conduct with the minimally required safeguard of content-neutral analysis, even if the teeth of content-neutral analysis have been somewhat blunted.<sup>133</sup> It certainly seems the 1972 Convention would adopt this view given the Bill of Rights Committee's comment that "expression" was included in Article II, Section 7 to "provide impetus" to Montana courts to rule on the "various forms of expression similar to the spoken word" and the way one "expresses his unique personality."<sup>134</sup>

For the most part, the Montana Supreme Court has declined to recognize many forms of expressive conduct. While it has recognized expressive conduct in corporate expenditures,<sup>135</sup> promising or refusing support to a

129. David Cole & William N Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HAR. C.R.-C.L. L. REV. 319 (1994).

130. See *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (Under the First Amendment, conduct is expressive if there is an intent to convey a particularized message, and a great likelihood that the message would be understood by those who viewed it.).

131. *Vivid Entm't, LLC v. Fielding*, 774 F.3d 566, 571 (9th Cir. 2014).

132. Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 49 (2000) ("[I]ncreasingly in free speech law, the central inquiry is whether the government action is content based or content neutral.").

133. *Id.* ("[I]n almost every free speech case decided by the Supreme Court . . . the outcome depended, in large part, on whether the Court characterized the law as content based or content neutral.").

134. See CONSTITUTIONAL CONVENTION TRANSCRIPT II, *supra* note 5, at 630.

135. *W. Tradition P'ship*, 291 P.3d at 556 (albeit probably reluctantly).

political candidate,<sup>136</sup> and sending letters,<sup>137</sup> it has been reluctant to find other forms of conduct expressive. Placing anti-religious bumper stickers in mailboxes,<sup>138</sup> nude dancing,<sup>139</sup> physically resisting removal from a council meeting,<sup>140</sup> honking a horn to protest an RV Park on the Yellowstone River,<sup>141</sup> and standing in front of a hunter to prevent him from shooting a wild bison,<sup>142</sup> have all been found to be non-expressive conduct. What is most alarming about these decisions is not the outcome; in most of the cases, if not all, there was a valid content-neutral law that would have lawfully impaired the expression. Instead, it is alarming that, despite the Montana Supreme Court's holding, all of these cases clearly involve expressions intended to convey a message. This is particularly true in light of U.S. Supreme Court cases where the conduct was more egregious yet was still found to be expressive, thus requiring the U.S. Supreme Court to analyze whether the expression was protected.<sup>143</sup>

The continued limitation of Article II, Section 7's scope has quite large implications: if honking a horn in protest is not expressive, then it is not speech, and if it is not speech, the legislature can ban it without implicating Article II, Section 7.<sup>144</sup> Any notion of triviality for banning honking a horn in protest should evaporate when honking a horn in protest is compared to other types of expressive conduct. There is little, if any, discernable difference in the communicative nature between burning a flag in protest<sup>145</sup> and honking a horn in protest. Similarly, a person sleeping overnight in a

136. *Greely*, 632 P.2d at 305.

137. *State v. Lance*, 721 P.2d 1258, 1267–1270 (Mont. 1986); *State v. Ross*, 889 P.2d 161, 163–167 (Mont. 1995).

138. *State v. Nye*, 943 P.2d 96, 100 (Mont. 1997) (citing *Spence v. Washington*, 418 U.S. 405, 409 (1974)) (“[T]he activity must be ‘sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.’ Nye has not shown that his conduct meets this test.”).

139. *City of Billings v. Laedeke*, 805 P.2d 1348, 1352 (Mont. 1991) (citing *City of Daytona Beach v. Del Percio*, 476 So.2d 197, 203–204 (Fla. 1985)) (citations omitted) (holding the municipality's inherent police power outweighed “the minimal speech protection at stake here.”).

140. *State v. Lowery*, 759 P.2d 158, 160 (Mont. 1988) (“[W]e conclude that Mr. Lowery's actions in physically resisting removal from the council meeting do not fit within the concept of speech protected under the Constitution.”).

141. *State v. Compas*, 964 P.2d 703, 706 (Mont. 1998) (“Compas must prove that her horn honking activities are constitutionally protected . . . [s]he has not done with regard to her ‘expressive conduct’ contention.”).

142. *State v. Lilburn*, 875 P.2d 1036, 1039–1044 (Mont. 1994) (In overbreadth analysis, finding statute that proscribes “dissuad[ing]” a hunter from taking an animal as regulating primarily conduct, not expression.).

143. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (cross burning); *Virginia v. Black*, 538 U.S. 343 (2003) (cross burning).

144. The regulation could, of course, be invalid on other grounds.

145. Flag burning was held protected by the First Amendment as expressive conduct in *Johnson*. 491 U.S. at 420.

park<sup>146</sup> communicates her message no better than a person standing in front of a hunter. Not recognizing the aforementioned conduct as expressive amounts to Montanans being denied even the minimal content-neutral safeguards of the First Amendment, let alone the heightened protections of Article II, Section 7, which explicitly protects expression.

The 1972 Bill of Rights Committee comment drafted the freedom of expression into Article II, Section 7 to “provide impetus to the courts in Montana to rule on various forms of expression similar to the spoken word and the ways in which one expresses his unique personality.”<sup>147</sup> When nude dancing and honking a horn in protest are not considered expressive, and thus bans on either would not implicate Article II, Section 7, it is fair to say the Montana Supreme Court has not been following that directive.

#### IV. CONCLUSION

In at least three areas, the Montana Supreme Court is following behind federal precedent. Given the Court’s refusal to not march lockstep with the United States Supreme Court in so many other areas<sup>148</sup>, it is an entirely uncharacteristic development. Unfortunately, the Court’s decisions lag behind basic First Amendment protections, meaning the Court is even farther from giving Article II, Section 7 the meaning the drafters and voters intended. However, there are plenty of ways to begin making progressive change.

Litigants can challenge the very core of the problem: the conception of Article II, Section 7, as providing no greater protection than the First Amendment. The precedent itself is based only on very weak reasoning in *City of Billings v. Laedeke*,<sup>149</sup> where the Court reached the conclusion because “[i]n the past, this Court has discussed the First Amendment and its state counterpart without distinguishing between the two provisions.”<sup>150</sup> While that may be true, it does not mean there is nothing to distinguish between Article II, Section 7, and the First Amendment. Not only can litigants rely on the textual, and thus substantive, differences between Article II, Section 7, and the First Amendment, there is also the extraordinary 1972

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146. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294–295 (1984) (held expressive conduct protected by the First Amendment).

147. CONSTITUTIONAL CONVENTION TRANSCRIPT II, *supra* note 5, at 630.

148. *Woirhaye v. Montana Fourth Judicial Dist. Court*, 972 P.2d 800 (Mont. 1998) (trial by jury); *State v. Guillaume*, 975 P.2d 312 (Mont. 1999) (double jeopardy); *State v. Hardaway*, 36 P.3d 900 (Mont. 2001) (search and seizure).

149. 805 P.2d 1348 (Mont. 1991).

150. *Id.* at 1351.



Bill of Rights Committee comment stating Article II, Section 7, was drafted specifically so the Court would not trail “merely in the wake of the federal case law.”<sup>151</sup>

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151. CONSTITUTIONAL CONVENTION TRANSCRIPT II, *supra* note 5, at 630.